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Texas Department of Health

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June 3, 1991

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The Honorable Dan Morales
Attorney General of Texas
Supreme Court Building
Austin, Texas 78711

Attention, Opinions Committee

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Opinion Committee

Dear General Morales:

The Texas Department of Health requests an opinion to determine the necessity of holding public hearings prior to the awarding of state grants to community organizations for HIV education, prevention, and risk reduction programs; and treatment, health and social service programs for persons with HIV infection. All concerned agree that hearings must be held for an initial grant (or grants totaling) over \$25,000. This request for opinion asks: Does Texas law require the Department of Health to hold hearings under any other circumstance?

The Human Immunodeficiency Virus Services Act, Ch. 1195§1, 1989 Texas General and Special Laws (Tex. Rev. Civ. Stat. Ann. Art. 4419b-4) (after Sept. 1, 1991 this provision will become §85.034 of the Health and Safety Code, under the terms of Ch. 14 of the 72nd legislature) contains the following provision:

Sec. 2.02 APPLICATION PROCEDURES AND INFORMATION. (a) The department shall establish application procedures and eligibility guidelines for the state grants. Those procedures must include regional public hearings after reasonable notice in the region in which the community organization is based before awarding an initial grant or grants totalling in excess of \$25,000 annually."

We have been asked whether or not we must hold hearings for renewal grants in excess of \$25,000. The question seems to turn on the interpretation of the phrase "an initial grant or grants totalling [sic*] in excess of \$25,000 annually". This phrase could have any of four alternative meanings:

*Though Webster's New Collegiate gives the double l spelling as acceptable, this is proper only in British usage. See H. Fowler, *Modern English Usage*, 340 (2nd ed. 1965), *Oxford American Dictionary*, 725 (1980), *The Random House Dictionary of the English Language* (2nd ed. 1987).

1) an initial grant of any size or [read: and] any grant in excess of \$25,000.

2) an initial grant of any size or [read: and] any grant (or combination of grants) in excess of \$25,000.

3) an initial grant (or combination thereof) in excess of \$25,000.

4) any grant (or combination thereof) in excess of \$25,000.

The Texas Department of Health has up until this time adhered to interpretation number three above. This interpretation seems the most straightforward to the Department, based upon the use of "or" instead of "and" after the phrase "an initial grant". This also seems the most likely intent of the Legislature based on the context of the entire Act as evidenced by its other provisions, some of which are discussed below. However, other interpretations have been urged on the Department consistently, and to resolve any potential ambiguity, we prefer to have an opinion from the Attorney General's Office.

Though a lengthy digression on the use of conjunctive and disjunctive terms is probably not appropriate here, as shown by the use of brackets in the language quoted above, the Health Department has assumed that the Legislature used the term "or" deliberately and properly. Other interpretations would assume they used "or" where in fact "and" was meant (See Sutherland Stat Const §21.14 (4th Ed)). Texas cases have held that the two terms are not interchangeable (*Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 580SW2d850 (Tex Civ App 1979) *Robinson v. Reliable Life Ins. Co.*, 569SW2d28 (Tex 1978)). Further, these interpretations would make the anomalous assumption that the Legislature was unconcerned about hearings for renewal grants up to \$25,000, but mandated hearings for all initial grants, no matter how small. Least likely of all is the fourth alternative, which assumes the Legislature used the term "initial" but meant for it to be ignored.

Article 2, of which this provision is a part, deals with the administration of a state grant program to nonprofit community organizations for HIV education, prevention, and risk reduction programs; and treatment, health, and social service programs for persons with HIV infection. Article 1, which deals with the development of education programs and materials, contains a provision which may be of some relevance in the interpretation of Sec.2.02: "Sec. 1.09. TERM OF CONTRACTS. A contract entered into by the department under this article may not be for a term of more than one year, except that a contract may be renewed without a public hearing".


It is also of some relevance to note that the Department is provided a relatively small budget to accomplish these hearings and other related expenses: "Sec. 2.05. ADMINISTRATIVE EXPENSES.

The department may not use more than five percent of the funds appropriated for the grant program to employ sufficient staff to review and process grant applications, monitor and evaluate the effectiveness of funded programs, and provide technical assistance to grantees".

The only legitimate legislative purpose for holding these hearings annually, instead of initially only, would be that of obtaining input from the community on the grant recipient. The Department believes that existing rules provide for adequate input of information from the community, through advisory boards and complaint procedures (see Title 25 TAC Chapter 98).

We would appreciate your guidance in this matter at your earliest convenience. If you require any further information, please contact Monty Waters, attorney, Office of General Counsel, Texas Department of Health, at (512) 458-7236.

Sincerely,


Robert Bernstein, M.D., F.A.C.P.
Commissioner of Health